88-174

Supreme Court, U.S.
FILED
JUL 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

EGON and SONYA LOEBNER,

PETITIONERS,

v.

FRANCHISE TAX BOARD OF CALIFORNIA,

RESPONDENT.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOR THE FIRST APPELLATE DISTRICT, DIVISION FOUR, CASE A030189 (SF 25067, CALIFORNIA SUPREME COURT)

EGON E. LOEBNER
SONYA S. LOEBNER

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Attorneys in Pro Se for
Petitioners

INDEX TO APPENDICES

		Page
A	OPINION SOUGHT TO BE REVIEWED	3a
B	CERTIFICATION FOR PUBLICATION OF A	31a
C	REMITTITUR FINALIZING DECISION IN A	33a
D	REVIEW GRANTED BY STATE SUPREME COURT	35a
E	DISMISSAL OF D	37a
F	TRIAL COURT'S DISMISSAL	39a
G	ORDER SUSTAINING DEMURRER	43a
H	RESPONDENT'S AFFIRMATION OF ACTION	47a
I	DENIAL OF REVIEW OF CORBETT	51a
J	OPINION OF CORBETT COURT	53a
K	FIRST DENIAL TO REPUBLISH CORBETT	99a
L	SECOND DENIAL TO REPUBLISH CORBETT	101a
M	PRESIDENTIAL APPOINTMENT OF LOEBNER	103a
N	EXCERPT FROM DEMURRER HEARING TRANSCRIPT	107a

APPENDIX A

COPY OF OPINION OF THE CALIFORNIA COURT OF APPEAL WHOSE DECISION IS SOUGHT TO BE REVIEWED (FILED JUNE 23, 1986)

NOT TO BE PUBLISHED
IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

EGON and SONYA LOEBNER,

Plaintiffs and Appellants,

v.

FRANCHISE TAX BOARD,

Defendant and Respondent.

A030289

(San Francisco
City and County
Sup. Ct. No. 826409)

[193 Cal.App.3d 67]

Plaintiffs Egon and Sonya Loebner appeal from a judgment of dismissal entered after the trial court sustained without leave to amend the demurrer of defendant Franchise Tax Board (the Board) to their complaint for a judicial determination that a personal income tax deficiency assessment by the Board was illegal. The principal issue presented is whether plaintiffs could institute this action without first paying the amount of the disputed assessment. We conclude that this question must be answered in the negative and that the trial court consequently acted properly in sustaining the Board's demurrer and dismissing the complaint.

I

We must treat the Board's demurrer as admitting all of the material factual allegations of plaintiffs' complaint,

with the exception of contentions, deductions, or conclusions of either fact or law. (Blank v. Kirwan (1985) 39 Cal.3d 311, 318 [216 Cal.Rptr. 718, 703 P.2d 58]; Serrano v. Priest (1971) 5 Cal.3d 584, 591 [96 Cal.Rptr. 601, 487 P.2d 1241, 41 A.L.R.3d 1187].) Our aim is to decide whether the complaint suffices to state a cause of action. (Glaire v. La Lanne Paris-Health Spa, Inc. (1974) 12 Cal.3d 915, 918 [117 Cal.Rptr. 541, 528 P.2d 357].)

In their verified "Complaint for Determination of Residency," plaintiffs alleged as follows: Plaintiffs were residents of California until December of 1974, at which time they left in order that Mr. Loebner could begin serving as a member of the United States embassy in the Soviet Union. They "engaged a real estate agent to look after their residence" in Palo Alto. Their household

effects and personal belongings were "liquidated," shipped to Moscow, or stored in "a State Department designated location." Mr. Loebner terminated various personal and professional associations in California. Plaintiffs transferred their medical records, financial accounts, and their mailing address, to locations outside of the state. They did not vote in California in 1975, nor did they file a California personal income tax return for that year. Plaintiffs returned to California in November of 1976. Thereafter they and the Board engaged in administrative proceedings which culminated with a determination that plaintiffs owed tax and interest for the calendar year 1976 amounting to approximately $3,400.

Plaintiffs' complaint ended in this fashion: "This action is brought against the . . . Board on the grounds that its

ruling . . . disallowing in its entirety plaintiffs' protest of [the Board's] Deficiency Assessment for calendar year 1976 based on Plaintiffs' alleged California residency is erroneous, unconstitutional, and without authority of law. By reason thereof, Plaintiffs

[193 Cal.App.3d 68]

allege that the . . . proposed deficiency assessment . . . is illegal and hence subject to cancellation by this action. [¶] WHEREFORE, Plaintiffs pray for judgment against the . . . Board dismissing the Deficiency Assessment and declaring plaintiffs to be [sic] nonresidents of California for the first ten months of calendar year 1976."

The Board demurred to the complaint on the grounds that (1) the trial court "has no jurisdiction over the subject of the action" and (2) the complaint failed to state facts sufficient to constitute a

cause of action against the Board. After conducting a hearing on the demurrer, the trial court sustained it on both of these grounds. A judgment of dismissal followed, prompting this timely appeal.[1]

---

1. In their notice of appeal plaintiffs, who at all times have proceeded in propria persona, purport to appeal from "the order of the Court sustaining the demurrer of [the] Board." That order is not appealable (I. J. Weinrot & Son, Inc. v. Jackson (1985) 40 Cal.3d 327, 331 [220 Cal.Rptr. 103, 708 P.2d 682]; Youngblood v. Board of Supervisors (1978) 22 Cal.3d 644, 651 [150 Cal.Rptr. 242, 586 P.2d 556]), but its merits can be reviewed on an appeal from the ensuing judgment of dismissal. (Selleck v. Globe International, Inc. (1985) 166 Cal.App.3d 1123, 1128, fn. 1 [212 Cal.Rptr. 838]; Gibson v. Government Employees Ins. Co. (1984) 162 Cal.App.3d 441, 444 [208 Cal.Rptr. 511].) Pursuant to the rule requiring that a notice of appeal be liberally construed in favor of its sufficiency (Cal. Rules of Court, rule 1(a)), we treat plaintiffs' notice as having taken a valid appeal from the subsequently entered judgment of dismissal. (Id., rule 2(c); Turpin v. Sortini (1982) 31 Cal.3d 220, 224, fn. 2 [182 Cal.Rptr. 337, 643 P.2d 954]; Battle v. Kessler (1983) 149 Cal.App.3d 853, 855 [197 Cal.Rtpr. 170]; Joffe v. United California Bank (1983) 141 Cal.App.3d 541, 547, fn. 1 [190 Cal.Rptr. 443].)

REVIEW

II

Article XIII, section 32 of the California Constitution (hereinafter referred to as section 32) provides:

> "No legal or equitable process shall issue in any proceeding in any court against the State or any officer thereof to prevent or enjoin the collection of any tax. After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be provided by the Legislature."

The Board's position, steadfastly maintained in both the trial court and here, is that section 32 is an absolute barrier against any type of attempt to secure any form of judicial relief regarding tax-related matters unless and until the tax has been paid. Plaintiffs contend that section 32 is by its express terms limited to actions for "collection of any tax" and does not affect their complaint for declaratory relief to

determine the validity of an assessment. The trial court believed itself bound to accept the Board's argument So do we.

[193 Cal.App.3d 69]

In Pacific Gas & Electric Co. v. State Bd. of Equalization (1980) 27 Cal.3d 277 [165 Cal.Rptr. 122, 611 P.2d 463], the supreme court considered whether section 32 barred an attempt to compel the Board of Equalization to reassess property in accordance with the then recently enacted Proposition 13 (Cal.Const., art. XIII A). The means chosen by the taxpayers to effect this reassessment was a petition for a writ of mandamus. The court, in the course of holding that this form of relief was precluded by section 32, made the following statements which possess a particular pertinency to this appeal:

"On its face the provision [section 32] appears to bar actions of the type

before us. It is certainly true that the assessment of real property is an integral part of the taxing process, and a court order invalidating an assessment will in effect 'prevent or enjoin the collection' of the tax. [Citations.] It is also the rule that a taxpayer may not circumvent restraints on prepayment tax litigation by seeking only declaratory relief." (27 Cal.3d 277 at p. 280.)

"The policy behind section 32 is to allow revenue collection to continue during litigation so that essential public services dependent on the funds are not unnecessarily interrupted. [Citation.] 'Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public.' [Citations.] To implement this policy, a specific statutory refund

procedure has been provided for taxpayers whose property has been improperly assessed. [Citations.] And to compensate a taxpayer who has been wrongfully required to pay, interest will be awarded on the refunded money. [Citation.] The utilities have attempted to circumvent this statutory scheme in an effort to obtain adjudication of their claims before payment. [¶] We hold that section 32 means what it says. Nothing in the policy underlying the section, its history, or the cases construing it, would support an exception . . . ." (27 Cal.3d 277 at pp. 283-284.)

The court in Pacific Gas & Electric Co. termed section 32 an "unequivocal constitutional prohibition against prepayment tax litigation." (27 Cal.3d 277 at p. 281.) Plaintiffs have marshalled an impressive array of materials relating to the current and

predecessor versions of section 32 to support a variety of arguments that this decision misperceived the intent of the voters who enacted the versions of section 32; that the court misconstrued previous decisions; and that Pacific Gas & Electric Co. should not be followed because it is "erroneous." These arguments are not persuasive. Pacific Gas & Electric Co. must be applied and followed without regard to our opinion as to its soundness. (Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455 [20 Cal.Rptr. 321, 259 P.2d 937].)

[193 Cal.App.3d 70]

Pacific Gas & Electric Co. has recently been reiterated by the Supreme Court (State Bd. of Equalization v. Superior Court (1985) 39 Cal.3d 633, 638-640 [217 Cal.Rptr. 238, 703 P.2d 1131]) and accepted without hesitation by other courts. (People ex rel. Franchise Tax

Bd. v. Superior Court (1985) 164 Cal.App.3d 526, 543-546 [210 Cal.Rptr. 695]; United States Steel Corp. v. Franchise Tax Board (1983) 144 Cal.App.3d 473, 481-482 [192 Cal.Rtpr. 677]; Hunter-Reay v. Franchise Tax Board (1983) 140 Cal.App.3d 875, 878-881 [189 Cal.Rptr. 810].)

The final paragraphs of plaintiffs' complaint were quoted ante to demonstrate that they are in effect seeking declaratory relief that the Board's deficiency assessment is illegal. This they do not dispute. "An action for declaratory relief is an equitable proceeding." (Fowler v. Ross (1983) 142 Cal.App.3d 472, 478 [191 Cal.Rptr. 183]; see 3 Witkin, Cal. Procedure (3d ed. 1985) Actions, § 87, [¶] (8), p. 115; 5 id., Pleading, § 800, [¶] (c), p. 244.) (3c) As such, plaintiffs' complaint is within the express terms of section 32

("No . . . equitable process shall issue . . ."") and likewise encompassed by the Supreme Court's construction of that provision to prohibit declaratory relief actions against assessments. (Pacific Gas & Electric Co. v. State Bd. of Equalization, supra, 27 Cal.3d 277 at p. 280.) It thus appears that plaintiffs' complaint is premature and barred by section 32 until they have paid the Board's assessment.

III

In apparent anticipation of this conclusion, plaintiffs make several arguments in support of their claim that section 32 is "voidable," which we take to mean that it is ineffective. As will be demonstrated, plaintiffs' arguments are unpersuasive.

(A)

In 1971 the California Constitutional Revision Commission submitted to the

Legislature a report recommending changes in article XIII of the constitution, which governed taxation. The commission specifically recommended that the substance of article XIII, section 15, paragraph 3--the predecessor version of section 32--should be deleted from the proposed text of the revised article XIII and dealt with by statute. In May of 1974, the Assembly Committee on Revenue and Taxation received a report from the "Constitutional Revision Task Force on Article XIII" which included a recommendation that section 32 should be set forth in its current constitutional form. The latter recommendation was adopted by the Legislature when it voted to submit to the electorate an amendment proposal

[193 Cal.App.3d 71]

to revise and reorganize article XIII. This measure was approved by the voters at the November 1974 General Election.

Plaintiffs now contend that because representatives of the Franchise Tax Board and the State Board of Equalization were members of the task force which drafted section 32 they thus encroached upon the legislative prerogatives of the Legislature. Plaintiffs ask us to hold that this violated article III, section 3 of the California Constitution, which reads:

"The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."

Plaintiffs' argument evidences a fundamental misperception of the nature of the process by which section 32 was enacted. It has been said that an act is "legislative" if it declares a public purpose or policy and makes provisions

for its accomplishment. (See Merriman v. Board of Supervisors (1983) 138 Cal.App.3d 889, 891 [188 Cal.Rptr. 343].) Legislative power is exercised when such a policy is adpoted, thus giving it the force of law. (Cf. Yost v. Thomas (1984) 36 Cal.App.3d 561, 570-571 [205 Cal.Rptr. 801, 685 P.2d 1152]; Horn v. County of Ventura (1979) 24 Cal.3d 605, 613 [156 Cal.Rtpr. 718, 596 P.2d 1134].) Within the context of constitutional amendments, adoption is by the people. (See Cal.Const. art. XVIII, § 4.) The Legislature may propose constitutional amendments, but only the people can enact them. In this sense, the ultimate "legislative" power is retained by the people. (See Carlson v. Cory (1983) 139 Cal.App.3d 724, 728 [189 Cal.Rtpr. 185]; Citizens Against a New Jail v. Board of Supervisors (1976) 63 Cal.App.3d 559, 563, [134 Cal.Rptr. 36]; cf. Cal. Const.,

preamble ["We, the People of the State of California . . . do establish this Constitution"]; id., art. II, § 1 ["All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require."].)

Viewed from this perspective, plaintiffs' conception of the separation of powers, in the ordinary trilateral division of executive, judicial, and legislative, is incorrect. Section 32 was enacted by the people in the exercise of their legislative power. The fact that certain representatives of taxing bodies may have participated in the drafting of the proposed constitutional amendment has no tainting effect because these persons had no influence in the people's legislative decision to enact

and give the binding force of law to that proposal.

(B)

Plaintiffs next assert that, in effect, the people did not know what they were doing by enacting the revisions to article XIII because they were "misinformed and misled" by the ballot pamphlet materials.

[193 Cal.App.3d 72]

The amendment passed by the voters in 1974 completely revised the constitutional provisions relating to taxation, one of the most complicated yet necessary powers of modern government. The changes between the immediate predecessors of section 32 and section 32 were minimal.[2]

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2. The earlier version provided: "No injunction or writ of mandate or other legal or equitable process shall ever issue in any suit, action or proceeding in any court against this State, or any officer thereof, to prevent or enjoin the collection of any tax levied under the provisions of this article, but after payment thereof [an]

The predecessor version had been judicially construed in the same manner as would section 32. (See Aronoff v. Franchise Tax Board (1963) 60 Cal.2d 177, 178-180 [32 Cal.Rptr. 1, 383 P.2d 409].) In these circumstances, the minor changes embodied in section 32 obviously did not qualify as a chief purpose which had to be included in the ballot summary. (Elec. Code, § 3503; Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization (1978) 22 Cal.3d 208, 242-244 [149 Cal.Rptr. 239, 583 P.2d 1281]; Epperson v. Jordan (1938) 12 Cal.2d 61, 65-71 [82 P.2d 445]; Tinsley v. Superior Court (1983) 150 Cal.App.3d 90, 108-109 [197 Cal.Rptr. 643].)

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action may be maintained to recover, with interest, in such manner as may be provided by law, any tax claimed to have been illegally collected." (Former Cal. Const., art. XIII, § 15, [¶] 3.)

Plaintiffs' contention that the voters did not know what they were doing merits only brief comment. This type of claim seems to be routinely made against any enactment passed by the voters. It is invariably rejected. (See, e.g., Brosnahan v. Brown (1979) 32 Cal.3d 236, 251-252 [186 Cal.Rptr. 30, 651 P.2d 274]; Fair Political Practices Com. v. Superior Court (1979) 25 Cal.3d 33, 42 [157 Cal.Rptr. 855, 599 P.2d 46]; Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, supra, 22 Cal.3d 208 at pp. 231, 243-244.) We do likewise.

IV

Plaintiffs have not pinned all of their hopes on their full-out assault on section 32. They have a fall-back position, which is that their complaint is authorized by certain statutes which

remove their complaint from the prohibitory ambit of section 32.

The statutes upon which plaintiffs rely are Revenue and Taxation Code section 19081 and Code of Civil Procedure section 1060.5.[3] The former is the

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3. Revenue and Taxation Code section 19081 provides:

"No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action, or proceeding in any court against this State or against any officer of this State to prevent or enjoin the assessment or collection of any tax under this part; provided, however, that any individual after protesting a notice or notices of deficiency assessment issued because of his alleged residence in this State and after appealing from the action of the Franchise Tax Board to the State Board of Equalization, may within 60 days after the action of the State Board of Equalization becomes final commence an action, on the grounds set forth in his protest, in the Superior Court of the County of Sacramento, in the County of Los Angeles or in the City and County of San Francisco against the Franchise Tax Board to determine the fact of his residence in this state during the year or years set forth in the notice or notices of deficiency assessments. No tax under this part based solely upon the residence of such

more important. The first clause of Revenue and Taxation section 19081 is substantially identical to the first sentence of section 32. Where this statute differs from section 32 is it does not include section 32's express requirement of payment preceding judicial proceedings, and in the statute's clearly expressed application to assessments. These differences do not, however, warrant sustaining plaintiffs' contention.

It is true that section 32 does not expressly refer to assessments, but the supreme court has unmistakably held that it does. (See part II, ante.)

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an individual shall be collected from such individual until 60 days after the action of the State Board of Equalization becomes final and, if he commences an action pursuant to this section, during the pendency of such action, other than by way of or under the jeopardy assessment provisions of this part."

Erroneously believing that the application of section 32 to assessments is an "ambiguity" which remains an open question, plaintiffs assert that an "unclear" constitutional provision "must yield to [a] clear statute." The supremacy of a constitution over a statute has been unchallenged since Marbury v. Madison (1803) 5 U.S. (1 Cranch) 137 [2 L.Ed. 60]. It applies in California. People v. Navarro (1972) 7 Cal.3d 247, 260 [102 Cal.Rptr. 137, 497 P.2d 481]; Molar v. Gates (1979) 98 Cal.App.3d 1, 24 [159 Cal.Rptr. 239, 12 A.L.R.4th 1197].) In California, a general constitutional provision prevails over a specific statute. (See Associated Home Builders etc, Inc. v. City of Livermore (1976) 18 Cal.3d 582, 595 [135 Cal.Rptr. 41, 557 P.2d 473, 92 A.L.R.3d 1038].)

The parties make other contentions which we do not reach because they could have no effect upon our decision.

V

It has been shown that California's fundamental law, as expressed in its constitution and by its highest court, prohibits prepayment tax litigation. An allegation that plaintiffs had paid the tax assessed by the Board was essential to their complaint. (See McHugh v. County of Santa Cruz (1973) 33 Cal.App.3d 533, 544 [109 Cal.Rptr. 149].) Without it they failed to state a cause of action. Such an allegation was also essential to the

[193 Cal.App.3d 74]

trial court's jurisdiction. (See Arnoff v. Franchise Tax Board, supra, 60 Cal.2d 177 at pp. 178-181; Estate of Schneider (1944) 62 Cal.App.2d 463, 465-466 [145 P.2d 90].) It thus appears that both

grounds of the Board's demurrer were sound. There being no possibility that plaintiffs could cure this defect by amending their complaint, the trial courft properly sustained the demurrer without granting leave to amend. (Blank v. Kirwan, supra, 39 Cal.3d 311 at p. 317; Martinez v. Sonoma Cos. (1974) 11 Cal.3d 394, 400 [113 Cal.Rptr. 585, 521 P.2d 841].)

The judgment of dismissal is affirmed.

Sabran, J.

WE CONCUR:

Anderson, P. J.

Poche, J.

APPENDIX B

COPY OF CERTIFICATION FOR PUBLICATION OF THE OPINION OF THE CALIFORNIA COURT OF APPEAL WHOSE DECISION IS SOUGHT TO BE REVIEWED (FILED JULY 23, 1986)

COURT OF APPEAL OF THE

STATE OF CALIFORNIA

in and for the

FIRST APPELLATE DISTRICT

DIVISION FOUR

EGON LOEBNER, et al.,

PLAINTIFF AND APPELLANT,

v.

FRANCHISE TAX BOARD,

DEFENDANT AND RESPONDENT.

NO. A030289

SAN FRANCISCO NO. 826409

BY THE COURT:

The written opinion which was filed on June 23, 1986 has now been certified for publication pursuant to rule 976(b) of the California Rules of Court, and it is therefore ordered that it be published in the Official Reports.

Dated: July 23, 1988 Anderson P. J.

APPENDIX C

COPY OF CERTIFICATION THAT THE DECISION OF THE CALIFORNIA COURT OF APPEAL WHOSE DECISION IS SOUGHT TO BE REVIEWED HAS BECOME FINAL (FILED MARCH 31, 1988)

COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FOR THE FIRST APPELLATE DISTRICT
DIVISION FOUR

LOEBNER, EGON E.
2934 Alexis Drive

Palo Alto, CA 94304

LOEBNER, EGON, ET AL.
vs.
FRANCHISE TAX BOARD
A030289
San Francisco County No. 826409

* * REMITTITUR * *

I, RON D. BARROW, Clerk of the Court of Appeal of the State of California, for the First Appellate District, do hereby certify that the decision entered in the above-entitled cause on June 23, 1986 has now become final.

____Appellant ____ Respondent to recover costs
____Each party to bear own costs
____Costs are not awarded in this proceeding
____See decision for costs determination

Witness my hand and the seal of the Court affixed at my office this

RON D. BARROW, Clerk

By: C. HOO

Deputy

APPENDIX D

COPY OF ORDER BY THE CALIFORNIA SUPREME COURT GRANTING REVIEW
(FILED SEPTEMBER 30, 1986)

SF 25067

ORDER GRANTING REVIEW
AFTER JUDGMENT BY COURT OF APPEAL
First District, Division Four
No. A030289

THE SUPREME COURT OF THE STATE
OF CALIFORNIA

IN BANK

LOEBNER, ET AL., Appellants

v.

FRANCHISE TAX BOARD, Respondent

Appellant's petition for review GRANTED.

Submission of of additional briefing, otherwise required by rule 29.3, California Rules of Court, is hereby deferred pending further order of the court.

BIRD
Chief Justice

BROUSSARD
Associate Justice

REYNOSO
Associate Justice

GRODIN
Associate Justice

APPENDIX E

COPY OF ORDER OF THE CALIFORNIA
SUPREME COURT DISMISSING REVIEW
(FILED MARCH 31, 1988)

No. S.F. 25067

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

LOEBNER

v.

FRANCHISE TAX BOARD

Pursuant to Rule 29.4 (c), California Rules of Court, the above-entitled review is DISMISSED and the cause is remanded to the Court of Appeal, First Appellate District, Division Four.

See Rule 976 (d), California Rules of Court.

LUCAS
Chief Justice

BROUSSARD
Associate Justice

PANELLI
Associate Justice

ARGUELLES
Associate Justice

Associate Justice

Associate Justice

Associate Justice

APPENDIX F

COPY OF JUDGMENT OF DISMISSAL OF THE
CALIFORNIA SUPERIOR COURT
(FILED NOVEMBER 27, 1984)

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SUPERIOR COURT OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO

EGON and SONYA LOEBNER,

Plaintiffs,

v.

FRANCHISE TAX BOARD,

Defendant.

No. 826409

JUDGMENT OF DISMISSAL

WHEREAS, the demurrer of defendant Franchise Tax Board to plaintiffs' complaint has been sustained without leave to amend on the grounds that the Court has no jurisdiction over the subject of the action and that said

complaint fails to state facts sufficient to constitute a cause of action against said defendant; and

WHEREAS, application has been made for entry of judgment in favor of defendant and against plaintiffs; and good cause appearing therefor,

IT IS ORDERED, ADJUDGED AND DEGREED that this action be and the same hereby is dismissed with prejudice; plaintiffs are to take nothing against said defendant by this action and said defendant is to recover their costs of suit herein.

Dated: November 23, 1984

_____

Judge of the Superior Court

APPENDIX G

COPY OF ORDER SUSTAINING DEMURRER OF
THE CALIFORNIA SUPERIOR COURT
(FILED NOVEMBER 27, 1984)

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State of California

SUPERIOR COURT OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO

EGON and SONYA LOEBNER,

Plaintiffs,

v.

FRANCHISE TAX BOARD,

Defendant.

No. 826409

ORDER SUSTAINING DEMURRER
WITHOUT LEAVE TO AMEND

The demurrer of defendant Franchise Tax Board to the complaint in the above-entitled action came on regularly for hearing on September 28, 1984. John K. Van de Kamp, Attorney General, by Patricia Streloff, Deputy Attorney

General, appeared as counsel for said defendant, and Egon E. Loebner appeared in pro per on behalf of plaintiffs. The matter was argued and submitted to the Court for decision. Upon due consideration, and good cause appearing therefore,

IT IS ORDERED that the demurrer of defendant Franchise Tax Board to the complaint be and is sustained without leave to amend on the grounds that the Court has no jurisdiction over the subject of the action and that said complaint fails to state facts sufficient to constitute a cause of action against defendant Franchise Tax Board. (Article XIII, section 32, Constitution of the State of California; Pacific Gas and Electric Co. v. State Bd. of Equalization (1980) 27 Cal.3d 277.)

Dated: November 23, 1984

_____

Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO

Department _____

EGON and SONYA LOEBNER,

Plaintiffs,

vs.

FRANCHISE TAX BOARD,

Defendant.

IN OPEN COURT

September 28, 1984

No. 826409

The demurrer of Defendant Franchise Tax Board is sustained without leave to amend for the reasons stated in the demurrer.

Defendant is to prepare the order.

_____

ROY L. WONDER
Judge of the Superior Court

MINUTE ORDER

APPENDIX H

COPY OF NOTICE OF ACTION OF CALIFORNIA FRANCHISE TAX BOARD AFFIRMING PREVIOUS NOTICE OF DEFICIENCY ASSESSMENT (MAILED FEBRUARY 5, 1981)

State of California
FRANCHISE TAX BOARD
Sacramento, California 95867
(800) 852-7050

EGON AND SONYA LOEBNER

2934 Alex Dr
Palo Alto CA 94304

Taxable year 1976
NPA No. 03730250
Dated 05/02/80
Account No. 103243213LOEB
Code 3432400/EY/JL
Date 02/06/81

THE NOTICE REFERRED TO ABOVE HAS BEEN AFFIRMED AS FOLLOWS

ADDITIONAL TAX
INTEREST TO 02/06/81
ADDITIONAL TAX AND INTEREST

ADDITIONAL INTEREST ACCRUES AT A RATE OF $.855 PER DAY FROM THE DATE OF THIS NOTICE.

SEE PAGE 2 FOR EXPLANATORY PARAGRAPHS.

Saul Levin
26521 Aric Ln
Los Altos Hills CA 94022

This Notice of Action constitutes formal action on your protest against the NPA designated above.

If you agree with this Notice of Action, you should pay promptly. Return the blue copy of this notice with payment to the Franchise Tax Board, Sacramento, CA 95867. Payment should include the liability plus interest as shown above.

If you do not agree with this Notice of Action, you may file an appeal with the State Board of Equalization. See reverse side for details.

FORM FTB 5930-M (1-80)

KEEP THIS COPY FOR YOUR RECORDS

WE HAVE RECEIVED YOUR PROTEST DATED MAY 6, 1980 AND UNDERSTAND THE INFORMATION YOU HAVE PRESENTED. HOWEVER, CONSIDERING ALL OF THE FACTS PRESENTED, THE NOTICE OF PROPOSED ASSESSMENT IS CORRECT FOR THE FOLLOWING REASONS.

RESIDENTS WHO LEAVE CALIFORNIA FOR A TEMPORARY OR TRANSITORY STAY ARE HELD TO BE RESIDENTS DURING THEIR ABSENCE AND ARE TAXABLE ON ALL THEIR INCOME.

THE TAXPAYER IS HELD TO BE A "RESIDENT" FOR THE TAXABLE YEAR PURSUANT TO SECTION 17014(B) OF THE REVENUE AND TAXATION CODE. REMITTANCE OF $224 IS BEING APPLIED AS OF JUNE 4, 1980.

APPENDIX I

COPY OF ORDER OF THE CALIFORNIA SUPREME COURT DENYING REVIEW OF CORBETT V. FRANCHISE TAX BOARD AND DECERTIFYING IT FOR PUBLICATION (FILED AUGUST 22, 1985)

ORDER DENYING REVIEW
AFTER JUDGMENET BY THE COURT OF APPEAL
2nd District, Division 3, No. B005216

IN BANK

Corbett et al., Respondents,

v.

FRANCHISE TAX BOARD, Appellant.

Appellant's petition for review DENIED.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above entitled appeal filed May 2, 1985, which appears at 167 Cal.App.3d 808. (Cal. Const., Art. VI, Section 14; Rule 976, Cal. Rules of Court.)

Bird, C. J., is of the view the opinion should remain published.

BIRD

Chief Justice

APPENDIX J

COPY OF THE DEPUBLISHED* CORBETT V. FRANCHISE TAX BOARD OPINION OF THE CALIFORNIA COURT OF APPEAL, SECOND DISTRICT, DIVISION THREE (FILED MAY 2, 1985)

*Had appeared as 167 Cal.App.3d 808

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

GEORGE T. CORBETT, et al.,

Plaintiffs and Respondents,

v.

FRANCHISE TAX BOARD,

Defendant and Appellant.

B005216

(Los Angles County
Sup.Ct. No.)

[167 Cal.App.3d 810]

INTRODUCTION

In this case we are called upon to determine whether respondents are liable as California residents for state income taxes on the whole of their income and whether Code of Civil Procedure section 1060.5 and Revenue and Taxation Code section 19081, under which they sought injunctive and declaratory relief from the tax, are unconstitutional and in conflict with article XIII, section 32, of the California Constitution. We affirm the judgment of the trial court which concluded respondents are not liable for the tax and that the statutes are not unconstitutional.

STATEMENT OF THE CASE

In a complaint filed in Los Angeles Superior Court, plaintiffs and respondents George T. Corbett and Annette Corbett (the Corbetts) sought declaratory

and injunctive relief against defendant and appellant Franchise Tax Board, a subdivision of the State of California (the Board), contending the Board's personal income tax assessments against them for the years 1970,

[167 Cal.App.3d 811]

1971, 1972 and 1973 were erroneous because they were not residents of California during those years.

Although the Corbetts filed nonresident tax returns for the tax years in question and paid California state income taxes on their income from California sources, the Board asserted the Corbetts should have filed resident tax returns and should have paid California income taxes on the whole of their income. The Board so contended notwithstanding that the Corbetts had filed Illinois resident tax returns and

had paid Illinois resident taxes for those years.

After exhausting their administrative remedies before the Board and the State Board of Equalization, the Corbetts filed an action in the Superior Court for the County of Los Angeles, seeking a judicial determination of nonresidency, in accordance with the procedures set forth in Code of Civil Procedure section 1060.5 and Revenue and Taxation Code section 19081.

HISTORICAL FACTS

The Corbetts and the Board, through their respective counsel, stipulated to the following applicable facts:[1]

The Corbetts were born, raised, married, and raised their own family, in Illinois.

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1. The Corbetts' connections with both California and Illinois during the audit period, as set forth in the stipulated facts, are summarized in appendix A to this opinion.

In 1937, Mr. Corbett began working for George E. Corbett Boiler and Tank, Inc., an Illinois corporation (Corbett Boiler), which had been founded by his grandfather. During the ensuing years he became its president and major shareholder. In 1968 and 1969, he prepared his brother-in-law, Mr. George Quill, to assume the presidency of the company. In 1969, he resigned as president and sold his entire stock interest to Mr. Quill. Concurrently, he assumed the office of vice president, and remained a member of the board of directors. Throughout the audit period of this case, he was consistently an employee of Corbett Boiler. When in Illinois, he inspected job sites, reviewed plans and blueprints, negotiated business and met with new clients. He kept current on boiler technology and attended contractors' association meetings in Illinois.

The Corbetts also were officers and directors of the Corbett Building Corporation, an Illinois corporation (Corbett Building), of which Mr. Corbett was president. They owned 82 percent of the shares of the corporation.

[167 Cal.App.3d 812]

Corbett Building owned industrial real estate, buildings, and vacant property, all located within the city of Chicago. Its business was the leasing of these properties to industrial concerns, including Corbett Boiler. As officers and directors of Corbett Building, both Mr. and Mrs. Corbett received yearly salaries from the corporation.

Over 95 percent of the Corbetts' income during the audit period was derived from their business interests and activities in Illinois. They had no business nor employment interests of any nature in California.

The Corbetts conduct almost all of their personal banking through the First National Bank of Chicago. All securities owned by the Corbetts are maintained in an agency account at that bank and are physically located there. They collect and deposit their income in Illinois. They had a small savings account and a checking account in Santa Barbara for small expenses and emergencies. The income from these California bank accounts was less than $300 per year.

The Corbetts' wills were prepared in Chicago; the wills, which are physically present there, recite the city of Chicago and the State of Illinois as the Corbetts' place of residence.

The Corbetts filed Illinois state resident income tax returns and paid the illinois income tax applicable to Illinois residents. They filed

California nonresident income tax returns and paid the California income tax applicable to nonresidents. Their Illinois address is shown as their permanent address on all of their state and federal tax returns. The tax returns are prepared in Illinois.

The Corbetts own and maintain a custom home in Chicago which they built more than 25 years ago. Their cemetery lots, voter registrations, family doctors, dentists, professional advisors, lawyers, bankers and accountants are all in Illinois.

The only real property interest the Corbetts have in California is a house in Santa Barbara, which they purchased in 1969 to provide accommodations during their visits to this state.

During the years in question, the Corbetts owned one car registered in Illinois and one which was registered in

California. They both had Illinois driver's licenses. Mrs. Corbett also had a California driver's license for a portion of the audit period.

The Corbetts attended church services wherever they were in the world. They were members of and made donations to a church in Illinois. They

[167 Cal.App.3d 813]

made donations to a church they attended in Santa Barbara, although they were not members.

The Corbetts had many friends and family members in Illinois. In 1973 they celebrated their 25th wedding anniversary in Chicago with a party for over 150 guests. They also attended a number of other social events in the Chicago area.

The Corbetts joined the Montecito Country Club of Santa Barbara and frequently played golf there. Their

other social activities in California consisted of visits with California relatives and attendance at occasional church functions. They enjoyed spending the winter season in sunny California and visiting their California relatives. For those reasons they stayed in California for lengthy periods during the audit years.

During the summer of 1972, while Mrs. Corbett was in California, she suffered a sudden and severe gall bladder attack. She was unable to return to Illinois for treatment by her regular physician. The operation caused her to remain in California for all of that summer and to curtail her travels in late 1972 and early 1973.

In each of the questioned years, the Corbetts spent less than nine months in California, ranging from six and one-half months in 1971 to eight and one-

half months in 1973. When not present in California, they were generally at their house in Chicago.

ISSUES

1. Whether Code of Civil Procedures section 1060.5 and Revenue and Taxation Code section 19081, under which the Corbetts brought their action for declaratory and injunctive relief from California income tax assessments, are in conflict with article XIII, section 32, of the California Constitution.

2. Whether the Corbetts were residents of California during the audit years for purposes of the California Personal Income Tax Law.

DISCUSSION

Code of Civil Procedure section 1060.5 and Revenue and Taxation Code section 19081 are constitutional.

Appellant contends Code of Civil Procedure section 1060.5 and Revenue and

Taxation Code section 19081 are unconstitutional in that they violate article XIII, section 32, of the California constitution.

[167 Cal.App.3d 814]

Section 32 provides: "No legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of any tax. After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be provided by the Legislature."

Section 1060.5 of the Code of Civil Procedure, enacted in 1955 (Stats. 1955, ch. 1555, § 1, p. 2834), forms part of the declaratory relief act (Code Civ. Proc., §§ 1060-1062.5). Section 1060.5 permits any person claiming nonresidence, for purposes of the Personal Income Tax

Law (Rev. & Tax. Code, § 17001 et seq.), to obtain a declaratory judgment regarding the fact of his or her residence by following the procedure set forth in Revenue and Tax Code section 19081.[2]

The declaratory relief act was passed in 1921 (Stats. 1921, ch. 643, § 1, p. 689). It was one of the first of its kind to appear in the United States. (See Harrison, California Legislation of 1921 Providing for Declaratory Relief (1921) 9 Cal.L.Rev. 359.) In 1923, a unanimous California

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2. California Code of Civil Procedure section 1060.5 provides: "Any individual claiming to be a nonresident of the State of California for the purposes of the Personal Income Tax Law may commence any action in the Superior Court in the County of Sacramento, or in the County of Los Angeles, or in the City and County of San Francisco, against the Franchise Tax Board to determine the fact of his residence in this State under the conditions and circumstances set forth in Section 19081 of the Revenue and Taxation Code."

Supreme Court held the act constitutional. (Blakeslee v. Wilson (1923) 190 Cal.2d 479 [132 P. 495]. In 1942, in Hoyt v. Board of Civil Service Commrs. (1942) 21 Cal.2d 399 [132 P.2d 804], the Supreme Court held that section 1060 authorized declaratory relief against state action. The court held that, where no impairment of sovereignty would result, and where no special statute precluded suit against the sovereign, it would be presumed that the Legislature intended the section to apply to governmental action. (Id., at p. 403, see pp. 400-405.)

However, special statutes did preclude the use of declaratory judgments in tax disputes between individuals and the government. (See Casey v. Bonelli (1949) 93 Cal.App.2d 253 [208 P.2d 723]; Lewis Eckert B. Co. v. Unemploy R. Com. (1941) 47 Cal.App.2d 844 [119 P.2d

227].) These special statutes were those that implemented[3] article XIII, section 32, of the California Constitution[4] and, in general, mirrored the working of a paragraph in former section 15, of article XIII,[5] the immediate predecessor of section 32. (See, e.g.,

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3. Section 33 of article XIII of the California Constitution (formerly 13) declares: "The Legislature shall pass all laws necessary to carry out the provisions of this article."

4. There have been similar constitutional provisions which have been subject to numerous minor revisions and renumberings since 1910. In 1974, this provision was placed in separate section 32 and amended to its present form. (See Pacific Gas & Electric Co. v. State Bd. of Equalization (1980) 27 Cal.3d 277, 280, fn. 3, 281, fn. 5 [165 Cal.Rtpr. 122, 611 P.2d 463].)

5. Former section 15 of article XIII of the California Constitution read, in part: "No injunction or writ of mandate or other legal or equitable process shall ever issue in any suit, action or proceeding in any court against this State, or any officer thereof, to prevent or enjoin the collection of any tax levied under the provisions of this article; but after payment thereof an action may be maintained to recover, with interest, in such manner as may be provided by law, any tax claimed to have been illegally collected."

Rev. & Tax. Code, 6931 [re sales and use taxes], 8146 [re motor vehicle fuel tax], 9171 [re use fuel tax], 11571 [54 private car tax], 13101 [re insurance tax], 16123 [re gift tax], 26101 [re bank and corporation taxes], 32411 [re alcoholic beverage tax].)

Prior to its amendment in 1955 (Stats. 1955, ch. 1707, § 1, p. 3141), when section 1060.5 was added to the Code of Civil Procedure, section 19081 provided: "No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action, or proceeding in any court against this State or against any officer of this State to prevent or enjoin the assessment or collection of any tax under this part."

As amended in 1955, section 1955, section 19081 retained its original provisions, as quoted above, but added

the provision that persons protesting a deficiency assessment, issued because of his or her alleged residence in this state, may bring court action against the Franchise Tax Board (after appealing from the Board to the State Board of Equalization) to determine the fact of residency, and that no tax based solely on residency shall be collected from such persons for 60 days after the action of the State Board of Equalization becomes final or during pendency of a court action.[6] (See

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6. Since its amendment in 1955, California Revenue and Taxation Code section 19081, has provided: "No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action, or proceeding in any court against this State or against any officer of this State to prevent or enjoin the assessment or collection of any tax under this part; provided, however, that any individual after protesting a notice or notices of deficiency assessment issued because of his alleged residence in this State and after appealing from the action of the Franchise Tax Board to the State Board of Equalization, may within 60 days after the action of the State Board of Equalization becomes final commence an action,

Review of 1955 Legislation (Cont. Ed. Bar) pp. 126-126.)

It is this 1955 amendment to Revenue and Taxation Code section 19081, and Code of Civil Procedure section 1060.5, enacted in 1955, which the

[167 Cal.App.3d 816]

Board urges conflict with article XIII, section 32, of the California Constitution and violate the principle derived therefrom, namely, that an action for a tax refund is the exclusive means of

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on the grounds set forth in his protest, in the Superior Court of the County of Sacramento, in the County of Los Angeles or in the City and County of San Francisco against the Franchise Tax Board to determine the fact of his residence in this State during the year or years set forth in the notice or notices of deficiency assessment. No tax under this part based solely upon the residence of such an individual shall be collected from such individual until 60 days after the action of the State Board of Equalization becomes final and, if he commences an action pursuant to this section, during the pendency of such action, other than by way of or under the jeopardy assessment provisions of this part."

obtaining judicial review of state tax assessments.[7]

The Board argues that whenever statutes conflict with constitutional provisions, the latter must prevail (People v. Navarro (1972) 7 Cal.3d 248, 260 [102 Cal.Rptr. 137, 497 P.2d 481]), that legislative mandates cannot take precedence over constitutional provisions (Molar v. Gates (1979) 98 Cal.App.3d 1, 24 [159 Cal.Rptr. 239, 12

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7. The cases cited by the Board for those propositions are readily distinguishable, because in none of the cases cited was the taxpayer challenging a personal income tax deficiency assessment on residency grounds. (See Pacific Gas & Electric Co. v. State Bd. of Equalization, supra, 27 Cal.3d 277, 279 [re adjustment of real property assessment pursuant to art. XIII A of the Cal. Const., popularly known as Prop. 13]; United States Steel Corp. v. Franchise Tax Board (1983) 144 Cal.App.3d 473, 481 [192 Cal.Rtpr. 677] [re bank and corporation taxes]; Hunter-Reay v. Franchise Tax Board (1983) 140 Cal.App.3d 875, 881 [189 Cal.Rptr. 801] [re personal income tax; assessment not protested on residency grounds]; Horack v. Franchise Tax Board (1971) 18 Cal.App.3d 363, 370 [95 Cal.Rptr. 717] [re personal income tax; a jeopardy assessment, not protested on residency grounds].)

A.L.R.4th 1197]) and that the Legislature may not exercise any power that is expressly or impliedly forbidden to it by the state Constitution (Wood v. Hamaguchi (1929) 207 Cal. 79, 90 [277 P. 113, 63 A.L.R. 861]).

While the Board's arguments are not wrong as far as they go, in Dupuy v. Superior Court (1975) 15 Cal.3d 410 [124 Cal.Rptr. 900, 541 P.2d 540], our Supreme Court held that "the anti-injunction provision of the California Constitution [Cal. Const., art. XIII, § 32] must yield to the paramount provisions of the United States Constitution (Cal. Const., art. III, §1) . . . ." (Id., at p. 418.)

The Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due

process of law."[8] (Italics added.)

The legal sage Bernard E. Witkin authoritatively advises: "In its origin, the meaning of the term 'due process' was procedural. The protection was against judicial or administrative procedure which, by reason of denial of notice and opportunity for a hearing, unfairly deprived a person or property or personal rights. . . . But in its development in the United States the due process clause has been interpreted as a limitation upon the legislative as well as the judicial and executive branches of the government, thus pre-

[167 Cal.App.3d 817]

venting arbitrary and unreasonable legislation. This aspect of the subject is known as substantive due process to

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8. The California Constitution also contains a due process clause (Cal. Const., art. I, § 7, subd.(a)).

distinguish it from procedural due process." (5 Witkin, Summary of Cal. Law (8th ed. 1974) Constitutional Law, § 279, pp. 3569-3570, original italics.)

Substantive due process is best illustrated by cases dealing with the police power, but substantive due process also restricts other governmental powers, such as the power of eminent domain and the power to tax. (Id., at p. 3570.)

The taxing power of a state, while basic to its sovereignty, is subject to substantive due process limitations, which include those relating to its territorial jurisdictions. (5 Witkin, Summary, of Cal. Law., supra, Taxation, 2, pp. 3988-3989; see also Sabine, Constitutional and Statutory Limits on the Power to Tax (1960) 12 Hastings L.J. 23, 30-40.) Some of these jurisdictional (substantive due process) aspects of state power were summarized in Miller

Bros. Co. v. Maryland (1954) 347 U.S. 340 [98 L.Ed. 744, 74 S.Ct. 535],[9] in which the United States Supreme Court held a Maryland use tax against a Delaware seller was void as extraterritorial. The court noted its holding was mandated by

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9. The United States Supreme Court in Miller Bros. Co. v. Maryland, supra, 347 U.S. 340, stated in regard to a state's power to tax consistent with the requirements of substantive due process: "[T]he Court has frequently held that a domicile or residence, more substantial than mere presence in transit or sojourn, is an adequate basis for taxation, including income, property,and death taxes. Since the Fourteenth Amendment makes one a citizen of the state wherein he resides, the fact of residence creates universally recognized reciprocal duties of protection by the state and of allegiance and support by the citizen. The latter obviously includes a duty to pay taxes, and their nature and measure is largely a political matter. Of course, the situs of property may tax it regardless of the citizenship, domicile or residence of the owner, the most obvious illustration being a tax on realty laid by the state in which the realty is located. Also, the keeping of tangible or intangible personality within a state may give it a similar taxable situs there (sometimes called a business or commercial situs or domicile). Certain activities or transactions carried on within a state, such as the use and sale of property may give jurisdiction to tax whomsoever engages therein, and the use of highways may subject the use to certain types of taxation. These cases overlap with those in which incorporation by

its theretofore consistent adherence to the time-honored concept: "[T]hat due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." (347 U.S. 340, 344-345 [98 L.Ed.2d 744, 748]; see 5 Witkin, Summary of Cal. Law, supra, Taxation, 2, p. 3989.)

Thus, "[a] state may constitutionally tax the income of its residents whenever earned as well as the income of non-residents derived from sources

[167 Cal.App.3d 818]

within the state." (Davis v. Franchise

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a state or permission to do business there forms the basis for proportionate taxation of a company, including its franchise, capital, income and property. Recent cases in which a taxable sale does not clearly take place within the taxing state, elements of the transaction occurring in different states, have presented peculiar difficulties, as have those where the party is liable for a use tax does not use the product within the taxing state." (At p. 345 [98 L.Ed. at pp. 748-749], fns. omitted.)

Tax Board (1977) 71 Cal.App.3d 998, 1002 [139 Cal.Rptr. 797]; see N.H. ex rel. Cohn v. Graves (1937) 300 U.S. 308, 313 [81 L.Ed. 666, 670, 57, S.Ct. 466, 108 A.L.R. 721]; Lawrence v. State Tax Comm. (1932) 286 U.S. 276, 280-281 [76 L.Ed. 1102, 1105-1106, 52 S.Ct. 556, 87 A.L.R. 374]; Shaffer v. Carter (1920) 252 U.S.37, 52-53 [64 L.Ed. 445, 456-457, 40 S.Ct. 221]; Travel v. Yale & Towne Mgf. Co. (1920) 252 U.D. 60, 75-76 [64 L.Ed. 460, 468, 40 S.Ct. 228].) In short, a state is without power to impose an income tax unless it has jurisdiction of the person taxed or of the property or business which produced the income taxed. (Shaffer v. Carter, supra, 252 U.D.37, 52 [64 L.Ed.2d 445, 456], 85 C.J.S., Taxation, 1090, p. 701.)

In Travis v. Yale & Towne Mfg. Co., supra, 252 U.S. 60, the United States Supreme Court explained this limitation

on the taxing power of the states thusly: "A statute imposing a personal tax on persons over whom the State has no jurisdiction conflicts with the Fourteenth Amendment and is a taking of property without due process of law. . . . If the State has not jurisdiction to impose a personal liability for tax on a non-resident, it is immaterial whether that non-resident is engaging in an occupation in the State from which he derives a large income or not. So, also if the State has the jurisdiction to impose a tax, it is immaterial whether the non-resident's occupation in the State is gainful in money or in health or in pleasure. The State either has or has not the jurisdiction to impose a personal liability against a non-resident for the payment of taxes." (At p. 68.)

The United States Supreme Court early held that "[w]here there is jurisdiction neither as to person nor property, the imposition of a tax would be ultra vires and void. If the legislature of a State should enact that the citizens or property of another State or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition." (St. Louis v. The Ferry Company (1870) 78 U.S. (11 Wall.) 423, 430 [20 L.Ed. 192, 194], original italics and italics added; 71 Am.Jur.2d State and Local Taxation, § 85, p. 409).

Clearly, in 1955, when the Legislature amended Revenue and Taxation Code section 19081 and enacted Code of Civil

Procedure section 1960.5--to allow a prepayment court action for persons protesting an income tax assessment on residency grounds--it intended thereby to safeguard the substantive due process rights of nonresidents. The Legisla-

[167 Cal.App.3d 819]

ture apparently recognized that such claim of nonresidency is a challenge to the very jurisdiction of the state to impose a personal income tax.[10]

(4) In California Housing Finance Agency v. Elliott (1976) 17 Cal.3d 575 [131 Cal.Rptr. 361, 551 P.2d 1193], the

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10. Both the United States and California Supreme Courts have held that procedural due process does not require judicial determination of tax liability before collection (Phillips v. Commissioner (1931) 283 U.S. 589, 597-599 [75 L.Ed. 1289, 1297-1298, 51 S.Ct. 608]; Dupuy v. Superior Court, supra, 15 Cal.3d 410, 416) nor preclude the government from effecting the collection of taxes by summary administrative proceedings (Phillips v. Commissioner, supra, at p. 595 [75 L.Ed. at p. 1296]; Dupuy v. Superior Court, supra, 15 Cal.3d at p. 416).

California Supreme Court restated a well settled principle: "In considering the constitutionality of a legislative act we presume its validity, resolving all doubts in favor of the Act. Unless conflict with a provision of the state or federal Constitution is clear and unquestionable, we must uphold the Act." (Id., at p. 594.)

(1c) In view of this presumption of statutory validity and the California Supreme Court's determination in Dupuy v. Superior Court, supra, 15 Cal.3d 410, 418, that the anti-injunction provision of the California Constitution (Cal. Const., art. XIII, § 32) must yield to the paramount provisions of the United States Constitution (Cal. Const., art. III, § 1), we hold that Revenue and Tax Code section 19081 and Code of Civil Procedure section 1060.5, are

constitutional under both the state and federal Constitutions.

II.

The Corbetts were not residents of California during the audit period.

The Board contends the trial court erred in finding the Corbetts were not residents of California during the audit period, the years 1970, 1971, 1972 and 1973.

Since the issue presented here involves the applicability of a statute to stipulated and uncontradicted facts, we are confronted with a pure question of law and are not bound by the findings of the trial court. (Klemp v. Franchise Tax Bd. (1975) 45 Cal.App.3d 870, 872 [119 Cal.Rptr. 821]; Whittell v. Franchise Tax Board (1964) 231 Cal.App.2d 278, 283 [41 Cal.Rptr. 673].)

In making our determination on the residency question, we are guided by

this court's decision in Klemp v. Franchise Tax Bd., supra, 45 Cal.App.3d 870. Klemp is significant because it is the only decision by a California

[167 Cal.App.3d 820]

court to delineate the basic residency requirements for liability under the Personal Income Tax Law. (See Comment (1975) 16 Santa Clara L.Rev. 176, 181.) It is also the only case to determine whether persons from another state have acquired a residency in California. (Id., at p. 181, fn. 34.)[11]

We therefore set forth the pertinent statutes in effect during the years in

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11. Whittell v. Franchise Tax Board, supra, 231 Cal.App.2d 278, was based on fact quite different from Klemp and this case. In Whittell the question was whether Californians had given up their California residence when they moved their domicile to Nevada. The question in Klemp and the instant case is whether persons from another state have acquired a residence in California. (See Klemp v. Franchise Tax Bd., supra, 45 Cal.App.3d at p. 875; and see Comment, supra, 16 Santa Clara L.Rev. at p. 181, fn. 34.)

question as did the Klemp court (at pp. 874-875), so that we may analyze the facts of this case in light of the governing law.

The relevant Revenue and Taxation Code provisions are as follows:[12]

Section 17014 imposes a tax "upon the entire taxable income of every resident of this state. . . ."

Section 17014 provides that "'Resident' includes:

"(a) Every individual who is in this State for other than a temporary or transitory purpose.

"(b) Every individual domiciled in this State who is outside the State for a temporary or transitory purpose.

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12. The quoted provisions of the Revenue and Taxation Code are those which were in effect during the audit years. The sections have since been renumbered, and otherwise changed, but the quoted provisions remain identical.

"Any individual who is a resident of this State continues to be a resident even though temporarily absent from the State."

Section 17015 provides that "'Nonresident' means every individual other than a resident."

Section 17016 raises a rebuttable presumption of residence: "Every individual who spends in the aggregate more than nine months of the taxable year within this State shall be presumed to be a resident. The presumption may be overcome by satisfactory evidence that the individual is in the State for a temporary or transitory purpose."

The issue here, as in the Klemp case, is whether during the audit years the Corbetts were in California "for other than a temporary, or transitory

[167 Cal.App.3d 821]

purpose" within the meaning of section

17014, which defines the meaning of "'Resident.'"

Our inquiry, therefore, is aided by an examination of the Board's own regulations, issued pursuant to Revenue and Taxation Code 19253, which interpret the statutory definition of residence. Included in these regulations are the following: "Whether or not the purpose for which an individual in this State will be considered temporary or transitory in character will depend to a large extent upon the facts and circumstances of each particular case. . . .

"The underlying theory of Sections 17014-1706 is that the state with which a person has the closest connection during the taxable year is the state of his residence.

"An individual whose presence in California does not exceed an aggregate of six months within the taxable year and

who is domiciled without the state and maintains a permanent abode at the place of his domicile, will be considered as being in this state for temporary or transitory purposes providing he does not engage in any activity or conduct within this State other than that of a seasonal visitor, tourist or guest.

"An individual may be a seasonal visitor, tourist or guest even though he owns or maintains an abode in California or has a bank account here for the purpose of paying personal expenses or joins local social clubs." (Cal.Admin. Code, tit. 18, regs. 17014-17016(b).)[13]

In the instant case, as in Klemp, the Board does not contend the Corbetts

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13. Regulations 17014-17016(b) of title 18 of the California Administrative Code was in effect during the audit years. The section has since been renumbered to Section 127014, but the quoted portions are identical in the present version of the regulation.

are individuals "dom[illegible]iled in this State" under section 17014. Impliedly they thus concede the Corbetts are domiciliaries of Illinois. Rather, the Board's argument emphasizes the comparison between the amount of time the Corbetts spent in California versus the time they spent in Illinois during the audit years.

Preliminarily, we note that since the Corbetts never spent nine or more months in California, they fall outside the statutory presumption of residence based on physical presence. (Rev. & Tax. Code, § 17016.) Section 17016 establishes that the length of time a person is in California does not necessarily compel a determination that he or she has acquired residence here. (Klemp v. Franchise Tax Bd., supra, 45 Cal.App.3d at p. 876.) The

section "concedes that evidence may show that presence for more than nine months is 'for a temporary or transitory purpose,' and, hence, does not constitute residence for income tax purposes." (Ibid.)

The regulations recognize that a person who stays in California as long as six months, who is domiciled without the state and who maintains a permanent abode at the place of domicile, may be considered as being in this state for temporary or transitory purposes "'providing he does not engage in any activity or conduct within this State other than that of a seasonal visitor, tourist or guest.'" (Ibid.) During the time in question, the Corbetts did Corbetts did not engage in any activity or conduct in California other than that of a seasonal visitor or tourist. The regulations

establish that the ownership of an abode, a bank account and a social club membership in this state do not subject a seasonal visitor to California income tax. (Id., at pp. 876-877.) That the Corbetts spent more than six months in California during some of the audit years is only a factor to be considered as an indication of the purpose of the visit, and should not "tip the scale" when all other circumstances point clearly to residency being in Illinois. (See, id., at p. 877.)

In comparing the facts of this case with those in Klemp, we note that the Corbetts spent almost nine months in California during some of the years in question, while the Klemps spent at most only six months of a questioned year in this state. However, unlike the Klemps, who rented a motel apartment in Chicago which they relinquished when they were

not in that city, the Corbetts maintained a permanent residence in their native Illinois, a factor which mitigates in favor of a finding they were seasonal visitors to California. (See 45 Cal.App.3d at p. 877.)

Otherwise the facts of the two cases are very similar. Both the Corbetts and the Klemps had prospered to the point where they were free to leave Illinois, returning only when their respective businesses needed them. The couples continued to manage substantial business interests in Illinois during their absences from that state, but none of those interests were transferred from Illinois to California. Both the Klemps and the Corbetts preserved in Illinois the many relationships and interests they had built over a lifetime.

The Klemps' only connection with California was their purpose to spend the

colder half of the year as visitors in the California desert, together with their ownership of a house and a club affiliation suitable for that purpose. (45 Cal.App.3d at p. 877.) The Corbetts' connection with California was almost identical to that of the Klemps, except that another purpose of the Corbetts' stays in California was a desire to be with their California relatives.

[167 Cal.App.3d 823]

The standards established by the statutes, the regulations and the Klemp case, require a finding that the state with which the Corbetts' had the "'closest connection during the taxable year[s]'" in question was their native Illinois, notwithstanding their lengthy stays in California. (45 Cal.App.3d at p. 876.) We hold, therefore, that the Corbetts remained Illinois residents

during those years and did not become California residents within the meaning of section 17014.

CONCLUSION

Substantive due process, in the development of our American jurisprudence, has been a bulwark in the series of safeguards created to curb and curtail governmental power in its dealings with the individual. Its historical roots stem from the struggle against the arbitrary and compulsive coercion of kings and their representatives. Its modern application is to protect the citizenry against the potentially overwhelming power, prestige and resources of the state. Its present role, as chronicled here, is as guardian of the People against improper confiscation of private property.

DISPOSITION

The judgment is affirmed.

Arabian, J.

Lui, J., concurred

KLEIN, P. J.--I concur in the result. This case deals with the power of the Franchise Tax Board to tax respondents as residents of California when they claim they are residents of Illinois. The issue thus presented is whether the state has jurisdiction to assess a tax against respondents without respondents' having the opportunity to challenge the state's claim of jurisdiction to impose a tax in the first instance.

To reiterate, the California Constitution, article XIII, section 32, provides "[n]o legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of any tax. After payment of

a tax claimed to be illegal, an action may be maintained to recover the tax paid, . . ." Pacific Gas & Electric Co. v. State Bd. of Equalization (1980) 27 Cal.3d 277 [65 Cal.Rptr. 122, 611 P.2d 463] upheld the application of section 32, article XIII, of the California Constitution in a fact situation not involving a question, as here, of jurisdiction of the state over the purported taxpayers.

Because of the limited application of Revenue and Taxation Code, section 19081 to persons claiming nonresidency status, I acquiesce in the majority view that the section is constitutional.

[167 Cal.App.3d 824]

APPENDIX A*

Nature of Connection	State of Closest Connection
Birth, marriage, raising family	Illinois
Preparation of tax returns	Illinois

Resident state income tax returns filed	Illinois
Payment and receipt of over 95% of income	Illinois
Own and occupy custom built home	Illinois
Serve as officer and employee of business corporation	Illinois
Hold license for conduct of profession	Illinois
Ownership of family corporation	Illinois
Own and occupy vacation home	California
Ownership of cemetery lots	Illinois
Church attendance	California & Illinois
Church donations	California & Illinois
Church membership and committee participation	Illinois
Family doctors and dentists	Illinois
Car registration	California & Illinois
Driver['s] license (Mr. Corbett)	Illinois
Driver['s] license (Mrs. Corbett)	California & Illinois
Registered to vote and voted	Illinois
Charge accounts	California & Illinois
Predominant banking and financial accounts	Illinois
Accountants, lawyers & professional advisors	Illinois
Wills prepared and located	Illinois
Education of child	Illinois
Most days within state	California
Country club membership	California
Plaintiffs intended state of residence	Illinois
Family members present and visited	California & Illinois
Social event attendance	Illinois
Professional membership	Illinois

Of the above listed twenty-nine (29) "connections" (compiled by extracting the facts in summary fashion from the filed Stipulations thereof in the same order presented therein) twenty (20) show a connection only with Illinois; three (3) show a connection only with California; and four (4) show some connection with both states.

*Exhibit A in the trial court.

APPENDIX K

COPY OF CALIFORNIA SUPREME COURT'S DENIAL OF TWO LETTER REQUESTS OF AUGUST 4 AND 15, 1986 TO PUBLISH IN PART THE CORBETT. V. FRANCHISE TAX BOARD OPINION (FILED NOVEMBER 19, 1986)

NO. 2/3 B005216

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

IN BANK

CORBETT ET AL.

V.

FRANCHISE TAX BOARD

The request for an order directing partial publication of the opinion in the above-entitled cause is DENIED.

BIRD

Chief Justice

APPENDIX L

COPY OF CALIFORNIA SUPREME COURT'S DENIAL OF AN APRIL 29, 1988 REQUEST TO PUBLISH IN PART THE CORBETT V. FRANCHISE TAX BOARD OPINION (FILED MAY 25, 1988)

NO. 1/4 B005216, 5005447

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

CORBETT ET AL., Respondents,

v.

FRANCHISE TAX BOARD, Appellant.

The request for an order directing partial publication of the opinion in the above-entitled cause is DENIED.

Lucas

Chief Justice

APPENDIX M

PRESIDENTIAL APPOINTMENT OF EGON E. LOEBNER TO DIPLOMATIC SERVICE

The President of the United States
of America

To Egon E. Loebner

a Foreign Service Reserve Officer of the United States of America. Greeting:

Reposing special trust and confidence in your Integrity, Prudence, and Ability, I have nominated and by and with the advice and consent of the Senate, do appoint you a Consular Officer and a Secretary in the Diplomatic Service of the United States of America and do authorize and empower you to have and to hold said office, and to exercise and enjoy all the rights, privileges, and immunities thereunto appertaining, during the pleasure of the President of the United States.

In testimony thereof I have caused the Seal of the United States to be hereunto affixed.

Done at the City of Washington this fifteenth day of March, in the year of

our Lord one thousand nine hundred and seventy-five, and of the Independence of the United States of America the one hundred and ninety ninth.

By the President: Gerald R. Ford

[signature]

Henry A. Kissinger [signature]
Secretary of State

Seal

APPENDIX N

EXCERPT FROM REPORTER'S TRANSCRIPT OF PROCEEDINGS BEFORE HON. L. WOUDES, JUDGE, DEPARTMENT 8, THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO ON FRIDAY, SEPTEMBER 28, 1984

Appearances:

For the Plaintiff: Mr. Egon E. Loebner
In Propria Persona

For the Defendant: Patricia Streloff
Deputy Attorney General

RT at 1

MS. STRELOFF: What is it that has raisd a question in your mind?

THE COURT: The provision in the code that says no tax will be collected for 60 days until after the State Board determines

RT at 2

residency;and if there is to be any litigation, that the collection will not be made until after the completion of that litigation. 19081. And that, of course, conflicts with the state constitution, Article XIII, Section 32, which would provide that in order to recover taxes that they first be paid.

MS. STRELOFF: Of course, that's our argument that the statute is unconstitutional.

THE COURT: I understand that. Mr. Loebner would prefer that I follow the statute with which your organization is

intimately familiar and assists in the drafting from inception through regulations and its administration.

Have you focused on this conflict before?

MS. STRELOFF: No, your honor.